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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-6854

NEVILLE M. TUCKER,
Petitioner,

vs.

KENTUCKY BAR ASSOCIATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

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PETITION FOR A WRIT OF CERTIORARI TO
THE COURT OF APPEALS OF KENTUCKY

Petitioner, Neville M. Tucker, respectfully prays that a writ of certiorari issue to review the judgment of the Court of Appeals of Kentucky, entered in the above entitled case on May 9, 1975; petition for rehearing denied June 27, 1975.

CITATION TO OPINION BELOW

The opinion of the Court of Appeals of Kentucky has not been reported and is printed in the Appendix at 1a.

JURISDICTION

The judgment of the Court of Appeals of Kentucky was entered on May 9, 1975, Appendix 1a. The petition for rehearing was denied on June 27, 1975, and on the same day there was issued the mandate, Appendix 4a, in which petitioner was permanently disbarred from the practice of law in the Commonwealth of Kentucky.

On motion of the petitioner, a stay of execution and enforcement of the mandate of the Court of Appeals was granted on June 30, 1973, for a period of ninety days from June 27, 1975. Under date of September 25, 1975, this Court, per Mr. Justice Stewart, continued the foregoing stay, pending the filing of a timely petition for a writ of certiorari, and this Court's action on such petition, and, if granted, pending the issuance of this Court's mandate.

By order of this Court dated September 19, 1975, per Mr. Justice Stewart, the time for the filing of the petition for a writ of certiorari was extended to and including November 10, 1975.

The jurisdiction of this Court is invoked under 28 U.S.C., §1257(3).

QUESTIONS PRESENTED FOR REVIEW

This is one of three cases coming before this Court in this term from Kentucky which present serious questions as to the Constitutionality of procedures employed by the Court of Appeals of Kentucky in respect to the disciplining of

attorneys. 1/

Though the precise issues presented by each of the cases are somewhat different, the pervasive feature which is reflected in all of them is that the design of disciplinary proceedings in Kentucky denies the fundamentals of due process.

The specific due process questions presented for review in this proceeding are the following:

1. Whether an attorney, having been charged by a bar association with conduct which it claims merits a reprimand and having been given notice that a proceeding is being brought in the highest court of the State to affirm that reprimand, may, consistent with the due process clause of the 14th Amendment, and without further notice, warning or an opportunity to be heard, be subjected to an escalation of the entire matter to the point of disbarment?

2. Whether, under the facts and circumstances of this case, the Commonwealth of Kentucky deprived petitioner of procedural due process by disbarring him without giving him fair notice that such a severe sanction was contemplated, and indeed by lulling him "into a false sense of security" by the lack of fair notice so that petitioner had "no reason even to suspect" that he might be disbarred? In re Ruffalo, 390 U.S. 544, 550-52 (1968).

1/ The other cases are: Getty v. Commonwealth of Kentucky ex rel. Kentucky Bar Association, No. 75-125, and Collis v. Kentucky Bar Association, No. 75-471.

3. Whether procedures for disbarment of attorneys in Kentucky may be sustained under the 14th Amendment where the Board of Governors, the decision-making body in the first instance, with full power to terminate the matter, considers and determines its actions in camera and without accepting briefs or arguments from the attorney, and where the Court of Appeals, which makes the ultimate decision, does not permit oral argument before it on any question?

4. Whether an attorney may be permanently disbarred from the practice of law under disciplinary procedures which state that it is "sufficient that facts be proved by a preponderance of the evidence" and where the disbarring court has acted on inferences not sustained by the record?

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, Amendment XIV, §1:

"... nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Rules of the Court of Appeals of Kentucky (RCA), 7 Baldwin's Kentucky Revised Statutes (1969):

"RCA 3.160. (a) Any complaint against an attorney for unprofessional conduct shall be filed with the Director who shall promptly notify the attorney by certified mail of the complaint and inform him that he has fifteen days to acknowledge receipt of the complaint or respond to the merits. ***"

"RCA 3.370. Upon receipt of the report of the Trial Committee the Board shall promptly consider and act upon the entire record. Only the President, the President-Elect, the Vice President and the fourteen duly elected members of the Board from their respective appellate districts shall be eligible to be present, participate in, and vote on any disciplinary case...

"The Board shall decide, by a roll call vote, whether the respondent is guilty or not guilty. If the respondent be found not guilty, the Board's action is final. If the respondent be found guilty, the Board shall then decide by a second roll call vote, the disciplinary action to be recommended. Both the finding of guilty and the disciplinary action to be recommended must be agreed upon by a majority of the members of the Board entitled to vote in the proceedings... If discipline is recommended the entire record, together with a certified bill for costs and expense incurred in the investigation preliminary to, and in the conduct of the proceedings shall be filed with the Clerk. Any recommendation to the court that disciplinary action shall be taken shall be advisory."

"RCA 3.410. Promptly upon the filing of the order as provided in RCA 3.370, the Clerk shall advance the case on the docket and shall forthwith issue a rule against the respondent returnable within twenty days... to show cause why he should not be adjudged guilty of unprofessional conduct and disciplined therefor."

"RCA 3.380. Upon finding by the Board of guilt or unprofessional conduct, discipline may

be administered by the Board without further proceedings or right of appeal to the Court; or by the Court ... upon recommendation by the Board, by way of public reprimand, censure, suspension from practice or disbarment. ***"

STATEMENT OF THE CASE

This case concerns the disbarment from the practice of law of petitioner, a 42-year-old Black attorney who in his 18-year legal career has participated in numerous unpopular civil rights cases. For four years of his career he sat as Police Court Judge in the City of Louisville, an elected position which made him at the time the highest elected Black official in the Commonwealth. Before that, he had been a member of the Louisville Board of Education. He has taken a firm position on the issue of integration in Louisville and in fact was a witness for the plaintiffs in the recent federal court proceeding on integration of the schools. His entire career has reflected a concern for the Constitutional and legal rights of the Black people of Kentucky.

The background facts of this case are relatively simple. Petitioner represented one Gloria Jean Brown of New Jersey in a personal injury claim. The claim was settled on October 2, 1972, and petitioner sent his client a check for $42,000 with a complete accounting as to counsel fees and expenses. No issue was ever raised by Ms. Brown as to the accuracy of that accounting. The letter included a statement that $666.96 was being retained by petitioner "until I can make the proper adjustment for the last plane ticket and hotel bill which I neglected to include in the settlement as a

deduction... You shall hear from me again in a few days, at which time I shall make the proper adjustments and forward the balance to you." Petitioner delayed resolving this relatively minor item and a check that he sent for $550 on August 14, 1973 in settlement of this item was returned for insufficient funds, as was a replacement check for $570 dated April 25, 1974.

Under date of July 22, 1974, petitioner received an informal notice from the Kentucky Bar Assocation that a complaint was being filed against him by Ms. Brown. Within a week, petitioner sent her a certified check in the amount of $570, paying in full all the moneys due her, including all bank charges incurred by her as a result of petitioner's checks having been returned for insufficient funds.

On September 13, 1974--almost three months after the matter had all been cleared up--petitioner was served with a formal complaint (Appendix 5a) by the Inquiry Tribunal of the Kentucky Bar Association, setting up three counts. No action was ever taken with respect to Count III, and the opinion of the Court of Appeals of Kentucky (Appendix 1a) makes it clear that it was not acting on Count I. Thus, at issue is only Count II, which charged solely the drawing of two checks (both for the same obligation) payable to Gloria Brown which were returned because of insufficient funds. Confident that he faced no serious problem before the Inquiry Tribunal, since the matter had been cleared up, petitioner elected to file no response to the complaint.

Under the Rules of the Court of Appeals of

Kentucky (hereafter "RCA"), the procedure with respect to disciplining of attorneys is as follows:

1. Charges are filed with the Director of the Kentucky Bar Association, who refers the matter to an Inquiry Tribunal (RCA 3.160).

2. If there are issues of fact, the inquiry Tribunal appoints a trial committee. But if the respondent elects not to file an answer, then the Inquiry Tribunal submits the file to the Board of Governors without findings or recommendations (RCA 3.210). 2/

3. Action of the Board of Governors is effected by a majority vote of the Board's 17 members. There are no proceedings in which the parties are heard before the Board; no briefs are filed before it; and indeed neither the complainant nor the respondent is permitted to appear before it. The Rules expressly provide that no person other than a member of the Board may even "be present" (RCA 3.370) during consideration of a disciplinary case, and no letters or communications may be sent to the Board (RCA 3.290). In short, it is a secret and in camera proceeding.

4. The Board is empowered by the Rules to

2/ If the attorney elects to file an answer and raise issues of fact, there are procedures for the appointment of a Trial Committee and the hearing of evidence. That was not done in this case.

determine by roll call vote "whether the respondent is guilty or not guilty," and, if guilty, "the disciplinary action to be recommended."

Under the Rules of the Kentucky Court of Appeals, a) if the respondent is found not guilty, the Board's action is final (RCA 3.370); b) if the respondent is found guilty and the Board recommends a "private reprimand," the matter is closed "without further proceedings or right to appeal to the Court" (RCA 3.380); c) if the finding is guilty, the matter goes to the Court upon "recommendation by the Board" (RCA 3.380). In petitioner's case the Board of Governors found him guilty of Counts I and II and recommended that he be given a public reprimand.

The first formal notice that petitioner received after the matter had been placed before the Board of Governors was after they had acted and he received a show cause "Rule" issued by the Clerk of the Court of Appeals of Kentucky under date of November 26, 1974, calling his attention to the fact that the Bar Association had recommended a public reprimand of him and directing him to respond (Appendix 4a). Petitioner had filed with the Board a response to the charges, but there is no evidence that his response was considered.

In his brief filed in response to the foregoing Rule, the petitioner did not contest the fact that checks had been returned for insufficient funds but he did point out (and the Court of Appeals appears to have accepted his view [Appendix 2a]) that there had not been a majority of the Board of Governors sustaining Count I, a charge of failing

to pay money to his client. In fact he had made the payment. Petitioner's presentation before the Court was that his conduct did not merit public reprimand, as recommended by the Board of Governors, but that at most a private reprimand would have been sufficient disciplinary action.

Though the only issue before the Court of Appeals was the recommendation by the Board of Governors that a public reprimand be made, with petitioner claiming that a private reprimand was sufficient, the Court of Appeals, on its own initiative and without warning or permitting argument, under date of May 9, 1975, handed down its opinion that petitioner be permanently disbarred from the practice of law in the Commonwealth. Petitioner thereupon filed a petition for rehearing and a motion for oral argument, both of which were denied without opinion (Appendix 4a). In the petition for rehearing, the first time petitioner could respond to the charge that his conduct merited disbarment, petitioner raised Federal Constitutional challenges to the procedures leading to the Kentucky Court's order. An amicus brief filed by a group of Kentucky lawyers and raising some of these Constitutional issues was also filed.

Since the Court of Appeals denied the petition for rehearing without an opinion, no reference to the Constitutional issues was made by that Court, but it must necessarily have considered and rejected those claims. New York ex rel. Bryant v. Zimmerman, 278 U.S. 63, 67 (1928).

REASONS FOR GRANTING THE WRIT

I.

THE CASE PRESENTS AN IMPORTANT ISSUE AS TO THE REQUIREMENTS OF FAIR NOTICE AS TO THE REACH OF THE GRIEVANCE PROCEDURE IN BAR DISCIPLINARY PROCEEDINGS, PARTICULARLY AS REGARDS FAIR NOTICE OF THE TYPE OF DISCIPLINE TO WHICH THE ATTORNEY MIGHT BE SUBJECT.

In re Ruffalo, 390 U.S. 544, 550-51 (1968), establishes that disciplinary proceedings of an attorney are "adversary proceedings of a quasi-criminal nature," and that the basic requirements of procedural due process apply, particularly fair notice as to the reach of the grievance procedure, the precise nature of the charges, and an opportunity to be heard. 3/

In the case at bar, the Court of Appeals of Kentucky, which interpreted Kentucky law in this case to give it complete and unrestricted power to determine the facts, the law, and the final action to be taken in all bar disciplinary proceedings (Appendix 2a), issued process to petitioner by way of a Rule reciting that the charging party, the Kentucky Bar Association, through its Board of Governors, had recommended a public

3/ The precise holding of Ruffalo was that "absence of fair notice as to the reach of the grievance procedure and the precise nature of the charges deprived petitioner of procedural due process." 390 U.S. at 552 (emphasis supplied).

reprimand of him, and directing him to show cause "why he should not be disciplined" (Appendix 4a). This was the notice served upon the petitioner, and it made clear that the only issue before the Court of Appeals was whether or not petitioner should be disciplined by way of public reprimand as recommended by the charging party.

The effect of this notice, in view of what ultimately transpired, was, in the language of Ruffalo, to lull petitioner "into a false sense of security," 390 U.S. at 551, n. 4, for the simple reason that petitioner had "no reason even to suspect," ibid., that the Court of Appeals was considering his disbarment--which, as far as concerns a lawyer's career, is capital punishment. 4/

4/ Compare the language of the order to show cause issued in Ruffalo, 390 U.S. at 545, wherein it was made absolutely clear in the order that the relief sought was disbarment of the attorney. And compare the unusual lengths to which this Court went in Selling v. Radford, 243 U.S. 46 (1917), where, after issuing a rule to show cause why an attorney should not be disbarred from this Court, and after receiving the attorney's answer, it considered the matter so important that the Court wrote what can only be described as an advisory opinion defining exactly what it considered to be open to its consideration and then, in order "not to foreclose the subject on the answer made to the rule to show cause," gave the respondent, sua sponte, additional time within which to file additional papers addressing themselves with specificity to the matters delineated in its opinion. Thereafter, it should be noted, the proceeding against the attorney was stricken from the docket. 244 U.S. 664 (1917).

The only issues in this case were whether the admitted conduct constituted unprofessional conduct and, if so, the appropriate punishment. Having been "lulled" into a belief that no more than a reprimand was involved, petitioner raised no issue except as to the nature of the reprimand.

His position before the Court in Kentucky would have been wholly different had he been notified that disbarment was sought and it is clear that the requirement of fair notice extends not only to the content of the charges but as well to the "reach of the grievance procedure." Ruffalo, supra.

Morgan v. United States, 304 U.S. 1 (1937), involved administrative proceedings before the Secretary of Agriculture of a "quasi-judicial" character. Even in this loose context, the Court, per Mr. Chief Justice Hughes, held it was "one of those fundamental requirements of fairness which are of the essence of due process in a proceeding of a judicial nature" (at 19) that "[t]hose who are brought into contest with the Government in a ... proceeding aimed at the control of their activities are entitled to be fairly advised of what the Government proposes and to be heard upon its proposals before it issues its final command" (at 18).

If the Board of Governors or the Court of Appeals proposed disbarment, then petitioner had a right, consistent with due process, to be so advised, and to be heard. If litigants in a proceeding which is only quasi-judicial must be so advised, then certainly an attorney in a proceeding before the highest court of a State, where the proceeding is not only judicial, but quasi-criminal, must be likewise advised.

Nor can it be seriously contended that petitioner had received notice of a possible disbarment. The rule directed him to show cause "why he should not be disciplined pursuant to the provisions of RCA 3.380." That provision states that "discipline may be administered ... by the Court ... upon recommendation by the Board, by way of public reprimand, censure, suspension ... or disbarment." While RCA 3.380 may be ambiguous when read alone, the show cause rule, by referring to the recommendation of public reprimand in addition to RCA 3.380, certainly led (or misled) petitioner to believe that the only issue before the Court was the propriety of a public reprimand. This was especially the case because the language of the show cause rule differed from the language specified for such a rule by RCA 3.410, which says that the attorney shall be ordered to "show cause why he should not be adjudged guilty of unprofessional conduct and disciplined therefor." 5/

Especially in view of the difference in language, petitioner had a right to assume that the only issue before the Court was whether or not he should receive a public reprimand.

While the Court of Appeals relied on Kentucky State Bar Association v. Stivers, Ky., 475 S.W.

5/ Compare the notice given to petitioner in the Collis case, supra, where the rule was in the exact language of RCA 3.410, and where the Board of Governors had recommended disbarment. See petition for certiorari in No. 75-471, presently pending before this Court, at p. 7 thereof.

2d 900 (1972), for its holding in the instant case that it was not limited in any way by the Board's recommendation, certainly petitioner here could not have relied on the Stivers opinion to put him on notice that the Court might disbar him because in that case the Board of Governors recommended that Stivers be suspended for three years, 475 S. W. 2d at 902, and the show cause rule so stated ("This proceeding comes before us on a rule to show cause why the respondent should not be suspended from the practice of law for a period of three years..." 475 S.W. 2d at 901). The opinion of the Court speaks essentially to its fact-finding power, and nowhere does the Court even intimate that it could or would impose a more severe penalty than that recommended without some further notice to the attorney. In fact, Stivers was given a one-year suspension, 475 S.W. 2d at 904-5. Certainly, the bald statements in Stivers with regard to the broad power of the Court cannot be construed to repair the Constitutionally inadequate notice in this case

Whatever may be the power of the Court of Appeals under Kentucky law, a question not here at issue, the Constitutional adequacy of the notice must be judged by what notice was in fact given, i.e., by the rule to show cause. Petitioner was Constitutionally entitled to be advised of what discipline the Court of Appeals might inflict upon him, and to be heard thereon. Cf., Morgan v. United States, supra.

As pointed out heretofore, in other disbarment cases the order to show cause is always explicit as to the penalty sought to be imposed. See, e.g., Ruffalo, at 545; Stivers, at 901; Selling v. Radford; all supra. If the rule here was ambiguous, it did

not give Constitutionally adequate notice, due to the seriousness of the matter at issue, and the capital punishment which was imposed. Cf., Ruffalo, supra; Selling v. Radford, supra. The effect of [redacted] this show cause rule, as is starkly evidenced in this case by the fact that petitioner's brief before the Court of Appeals argued not that he should not be disbarred, but merely that he should not be publicly reprimanded as recommended by the Board of Governors, is to do exactly what was held to be Constitutionally impermissible in Ruffalo, i.e., to lull the attorney "into a false sense of security" by giving him "no reason even to suspect" that he might be disbarred. See 390 U.S. at 551, n. 4. Indeed, it is hardly possible to imagine any attorney faced with disbarment not arguing to the point unless, as happened here, the attorney had "no reason even to suspect" that he might be disbarred.

II.

THE CASE PRESENTS AN IMPORTANT ISSUE AS TO THE SCOPE OF THE RIGHT TO BE HEARD IN BAR DISCIPLINARY PROCEEDINGS BEFORE INTERMEDIATE BODIES WHICH HAVE THE POWER TO ACQUIT OR OTHERWISE TERMINATE THE MATTER AND THE COURT WHICH HAS THE ULTIMATE POWER TO CONVICT AND DISBAR.

The procedures for discipline of lawyers in Kentucky are extraordinary in the extent to which they deny due process. RCA 3.370 empowers the Board of Governors--the intermediate advisory

body--to render a "not guilty" verdict on the charges brought against the attorney. In the event the Board so finds, RCA 3.370 provides that "the Board's action is final." 6/ Furthermore, even if the Board should convict, the Kentucky Rules provide it with the further power to entirely terminate the matter merely by recommending a private reprimand. RCA 3.380.

The difficulty arises from the fact that RCA 3.370 also operates to deny an accused attorney, like the petitioner, all opportunity to appear befor the Board or to submit any brief or argument urging that such a final acquittal determination, or a mere private reprimand, be made.

In Southern Railway Co. v. Virginia, 290 U.S. 190, 197-9 (1933), this Court held that where a State highway commissioner was statutorily "empowered, without notice or hearing, to act with finality upon his own opinion and ordain the taking of private property," the "inhibitions" of the 14th Amendment outlawed such a final unfavorable decision; the affected party was held "entitled to a fair hearing upon the fundamental facts." Is not a party similarly entitled to a "fair hearing" before an intermediate State agency empowered by court rule to render a final determination favorable to the accused individual?

6/ In Kentucky State Bar Association v. Stivers, Ky., 475 S.W. 2d 900, 904 (1971), the Court of Appeals observed: "So far as we are concerned the Board proceeding is mainly a screening device by which the respondent may be finally acquitted but cannot be convicted."

If part of the duties of the Board of Governors is to determine if the accused attorney is not guilty or merely entitled to a private reprimand, "that duty cannot be performed by one who has not considered evidence or argument," for "the one who decides must hear." Morgan v. United States, supra, 298 U.S. at 481; emphasis added. Due process thus requires that an affected party be given the opportunity at least to present written or oral argument before a body possessing powers of final adjudication in certain areas. In the circumstances of a quasi-criminal disciplinary proceeding, where the accused attorney can be "condemned to suffer grievous loss" (Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 168 [1951]), it becomes appropriate for this Court to delineate the necessity and scope of the argumentative-type hearing that might be appropriate before the Board of Governors. As the Kentucky procedures now stand, the Board acts in camera without giving the attorney even the semblance of procedural due process.

Nor is the situation different for the petitioner because he failed to file a response before the Trial Committee. Only the Board could make a final determination, which in this case revolved about whether, upon all the circumstances, the transmission of checks which were returned for insufficient funds constituted unprofessional conduct and, if so, what the punishment, if any, should be. On these critical questions there was no way of communicating with, let alone being heard by, the Board--which at least had the power either to acquit or order a private reprimand which would end the matter.

The lack of due process at the level of the Board is not mitigated, but rather is exacerbated, by the position of the Court of Appeals of Kentucky as to the Court's fact-finding power. In Kentucky State Bar Association v. Stivers, supra, 475 S.W. 2d at 903-904, the Court of Appeals said:

> "The role of fact-finder is neither welcome nor comfortable to an appellate court, but obviously we have saddled it upon ourselves by our own rules for this type of proceeding." 7/

The Court of Appeals has thus abjured any role as an appellate or reviewing court in disciplinary cases; it has declined to give any weight to the findings of the Board of Governors or to determine if those findings are supported by substantial evidence. Instead, the Court of Appeals has openly adopted "the role of fact-finder." The members of the Court of Appeals can thus make their own findings of fact, as they did in this case by inferring that the petitioner "converted those funds to his own use."

True, the demands of due process do not require an evidentiary hearing "at any particular point or at more than one point in an administrative proceeding so long as the requisite hearing is held before the final order becomes effective."

7/ This Court denied certiorari in the Stivers case, 406 U.S. 968 (1972). But the petition in that case did not raise the Constitutional questions here raised.

Opp Cotton Mills v. Administrator, 312 U.S. 126, 152-3 (1941). But that assumes that at some point there is an evidentiary hearing which is given some weight.

Since there were in this case no factual issues as to whether or not the checks had been issued, there was no trial before a Trial Committee. Where, then, could petitioner be heard and present evidence on the question whether his conduct amounted to professional misconduct and, if so, what punishment was appropriate? Not before the Board; that is an in camera proceeding.

Then what type of hearing did he have before the Kentucky Court? Though it claimed the power of fact-finding, it had no record from which it could consider the issues, nor any procedure for the taking of testimony. And when petitioner discovered that disbarment was being sought, he requested oral argument but that was denied. This was peculiarly the kind of case where oral argument was required and for precisely the reasons set forth in Herring v. New York, ____ U.S. ____, 45 L. Ed.2d 593 (1975). And it should be noted that in Herring the Court was addressing the right of oral argument before a court, not a jury, and of argument as to the conclusions to be drawn from the facts.

The combination of lack of a record, the insistence by the Court of Appeals that it alone is the fact-finder, the lack of a mechanism for taking evidence, and the denial of oral argument add up to a total lack of due process at the level of the Court of Appeals of Kentucky.

III.

THE CASE PRESENTS AN IMPORTANT CONSTITUTIONAL QUESTION ON THE STANDARD OF PROOF REQUIRED IN BAR DISCIPLINARY PROCEEDINGS RESULTING IN DISBARMENT.

RCA 3.330 expressly provides "the burden of proof shall rest upon the Association in a disciplinary proceeding and the facts must be proven by a preponderance of the evidence."

While it is true that there was no issue in this case as to whether the checks were issued, the Court of Appeals nevertheless, in order to sustain the extreme penalty of disbarment, drew certain factual inferences. It said in its opinion (Appendix 3a), "Simply stated, respondent had converted those funds to his own use."

There was absolutely no proof of conversion. In fact, the Board of Governors had not by a majority vote found a failure to pay funds due to the client. Thus, the Court of Appeals' inference of conversion was unsustained by the record. There are any number of inferences other than conversion that may be drawn from the return of a check for insufficient funds.

No such inference could have been drawn by the Court of Appeals had it been required to pursue a standard of proof other than the most limited one defined by its Rules. The adoption by the Court of Appeals of the minimum standard of proof--preponderance of the evidence, as is employed in civil cases--is inappropriate to a bar

disciplinary proceeding which is "quasi-criminal in nature," In re Ruffalo, supra. And see, In re Winship, 397 U.S. 358 (1970), holding that in a juvenile delinquency proceeding, even though not a "criminal prosecution," 397 U.S. at 359, n. 1, the required standard was proof beyond a reasonable doubt. The Court there specifically struck down a standard of preponderance of the evidence.

Certainly the standard of proof here should at least be that the proof be by "unequivocal and convincing evidence," which this Court has required in other proceedings which, though non-criminal, have grave impact upon the lives of human beings, Woodby v. Immigration & Naturalization Service, 385 U.S. 276, 285 (1966).

The facts of this case demonstrate how the standard of proof was critical at the stage of consideration before the matter came to the Court. The Board of Governors by a vote of nine to three found the petitioner guilty of unprofessional conduct, nine votes being the minimum required under the Rules for returning a finding of guilt. Is it not entirely likely that if the Board of Governors had utilized a standard more stringent than "by a preponderance of the evidence," it would have changed the vote of at least one of the members of the Board who voted for guilt? Cf., In re Winship, supra, 397 U.S. at 360. Under the Rules of the Court of Appeals, the proceedings would then have ended by a failure of the Board to find by a majority vote that unprofessional conduct had occurred.

Thus it is clear that at both the administrative

and the judicial levels the standard of proof had decisive impact on this case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated:
November 10, 1975.

Respectfully submitted,

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Counsel for Petitioner

APPENDIX
Opinion

IN COURT OF APPEALS OF KENTUCKY

KENTUCKY BAR ASSOCIATION
Complainant

v.

NEVILLE M. TUCKER
Respondent

PER CURIAM

This is a disciplinary proceeding in which the Board of Governors of the Kentucky Bar Association found respondent guilty of unprofessional conduct and recommended that he be publicly reprimanded and ordered to pay the costs of the action.

A charge was filed against the respondent after he failed to file a response to the complaints certified to him. After the charge was filed, respondent failed to file a timely answer as required by RCA 3.160. The inquiry tribunal entered an order submitting the record to the Board of Governors for disposition. More than a month after submission, the respondent attempted to file a late answer to the charge.

The respondent settled a personal injury claim for a New Jersey client. After payment of expenses and attorney fee, there remained a balance of $42,666.96. Respondent forwarded a check to his client in the sum of $42,000, stating that $666.96 was being retained "until I can make the proper adjustment for the last plane ticket and a hotel bill which I neglected to include in the settlement as a deduction ***. You shall hear from me

again in a few days at which time I shall make the proper adjustment and forward the balance to you." About nine months later and after nine written demands by his client's New Jersey lawyer, respondent forwarded a check to his client for $550. This check was returned to the client twice marked "insufficient funds." After another eight months elapsed and four additional written demands for payment, respondent forwarded another check to his client in the sum of $570. This check also was returned because of "insufficient funds." Four months later after respondent's client filed a complaint with the Kentucky Bar Association, respondent sent a certified check to his client in the sum of $570.

Count I of the charge has as its basis the withholding of the client's money. Count II of the charge is based on the respondent's checks being returned for "insufficient funds."

Respondent's answer recites that the delay in remitting funds was caused by the exchange of an airline ticket by the client and members of her family. Further that a certified check in the sum of $570 was submitted which represented the amount due the client plus the charges incurred by the return of the other checks.

Respondent argues that the vote of guilty on Count I by the Board of Governors does not represent a majority vote. We are not disposed to unravel this question for the reason that we direct this opinion to the matters contained in Count II of the charge.

The recommendation by the Board of Governors is advisory only. This means that this court must be the judge of the factual as well as the legal issues and of the final action to be taken. Kentucky State Bar Association v. Stivers, Ky., 475 S.W. 2d 900 (1972).

We are of the opinion that the facts set out in Count II, and admitted by respondent, constitute such dishonesty by the respondent as to warrant permanent disbarment from the practice of law. The fact that these checks were returned for "insufficient funds" can only have one meaning, that is the client's funds were no longer intact. Simply stated, respondent had converted these funds to his own use. We see little difference in the facts here and those in In re Waxman, 290 Ky. 277, 160 S.W. 2d 587 (1942), which resulted in the permanent disbarment of an attorney. The fact that restitution was made does not alter the initial dishonesty in misappropriating his client's funds. With respect to a client's funds in the hands of an attorney, he is the trustee of an express trust, and converting these funds to his own use is such reprehensible conduct as to make him unworthy of public confidence and unfit to discharge in a proper manner his obligations as an officer of the court.

Honesty, high ethical standards and good moral character are necessary qualifications for admission to the bar, and their existence is essential to the continuance of such membership. Therefore, when an attorney ceases to possess these traits of character in whatever mode or manner the want of them is exhibited, he may be removed.

Cf. Kentucky Bar Association v. Collis, Ky., ___ S.W. 2d ___ (rendered May 9, 1975).

Accordingly, it is ordered that the respondent be and he is hereby permanently disbarred from the practice of law in this Commonwealth, and he is required to pay the costs of this proceeding.

All concur.

Rendered: May 9, 1975.

Order Denying Motion for Oral Argument

The motion of the respondent, Neville M. Tucker, for the granting of an oral argument in this proceeding is hereby denied.

Full court sitting. All concur.

ENTERED this 27th day of June 1975.

Scott Reed
Chief Justice

Mandate and Order Denying
Petition for Rehearing

It is therefore ordered that the respondent, Neville M. Tucker, is hereby permanently disbarred from the practice of law in the Commonwealth of Kentucky, that he fully comply with the provision of RCA 3.390 and that the respondent is ordered to pay the costs of this action including the cost certified by the Kentucky Bar Association.

Frances Jones Mills
C.C.A.

Issued June 27, 1975.

RESPONDENT'S PETITION FOR REHEARING DENIED 6-27-75.

Rule
on Finding and Recommendation of the
Board of Governors of the Kentucky Bar Assn.

THE COMMONWEALTH OF KENTUCKY,

To the Sheriff of Jefferson County, GREETINGS:

The Vice President of the Kentucky Bar Association having filed an order pursuant to RCA

3.370 recommending a public reprimand of Respondent in the matter of KENTUCKY BAR ASSOCIATION, Complainant Versus NEVILLE M. TUCKER, Respondent, you are hereby commanded to summons Respondent to file due response within 20 days after the service of this summons, and show cause, if any he has or can, why he should not be disciplined pursuant to the provisions of RCA 3.380, and warn him that upon his failure to answer, the Rule herein shall be made absolute and you will make due return of this summons immediately upon the execution thereof.

Issued at Frankfort, Kentucky, this the 26th day of November, 1974.

Frances Jones Mills
Clerk, Kentucky Court
of Appeals

Charge

Comes now the Kentucky Bar Association, by and through its Inquiry Tribunal, and states that Respondent Neville M. Tucker, whose last known address is 235 South Fifth Street, Louisville, Kentucky 40202, a member of said association, did engage in the following unprofessional and unethical conduct:

I.

Gloria Jean Brown, 174 No. Grove Street, East Orange, New Jersey, was represented by Respondent Neville M. Tucker in a personal injury case wherein the settlement due to said Brown was $42,666.96. Respondent then sent, by letter dated October 2, 1972, a check to Brown for $42,000. Respondent told Brown he retained $666.96 of Brown's settlement in order to make

certain adjustments for travel expenses. Brown made repeated demand to Respondent requesting the remainder of her settlement on October 31, November 28 of 1972, January 15, April 9, August 14 of 1973, and March 5, March 26, April 9, June 13 of 1974. Respondent has delayed and/or failed to timely pay Brown the monies due her.

II.

On or about August 14, 1973, within the same facts and circumstances described in Count I above, the said Brown received from Respondent a check for approximately $550 due to Brown as the remainder of the said personal injury settlement. Brown deposited Respondent's check twice but both times it was returned because of insufficient funds. In April of 1974, Respondent issued check #130 drawn on his account at First Louisville Bank, Louisville, Kentucky, dated April 25, in the amount of $570 payable to Gloria Brown. This check was returned marked "insufficient funds."

III.

In March, 1973, Respondent was hired by Henry Owens, Jr., 305 Virginia Avenue, Louisville, Kentucky 40211, to appeal an adverse ruling by the Bullitt County Court concerning the estate of Owens' mother. Respondent gave the filing fee and appeal papers to Owens and told Owens to file the appeal. Owens then learned that the appeal had been dismissed by the Bullitt Circuit Court on September 28, 1974. Respondent falsely told Owens that the appeal was dismissed because of certain people doing as they wish in Bullitt County, when in fact, it was dismissed because it was untimely filed. Respondent then

informed Owens that the Bullitt Circuit Court ruling could be appealed to the Court of Appeals of Kentucky. Respondent then failed to appeal in the Bullitt Circuit Court until October 29, 1973, and failed to perfect his appeal to the Court of Appeals of Kentucky. On March 12, 1974, the appellee filed a motion to dismiss Respondent's appeal on the grounds that it is untimely, whereupon the Court of Appeals dismissed the appeal on March 21, 1974.

WHEREFORE, Complainant charges that such actions by Respondent constitute unethical and unprofessional conduct calculated to bring the bench and bar of Kentucky into disrepute; and that discipline of an appropriate degree should be administered to Respondent in accordance with RCA 3.380.

KENTUCKY BAR ASSOCIATION
By: William P. Donan
Chairman,
Inquiry Tribunal

ATTEST:
Leslie G. Whitmer
Director